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Nos. 93-1456 and 93-1828

IN THE
Supreme Court of The United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*, *Petitioners*,

v.

RAY THORNTON, *et al.*, *Respondents*.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT, ATTORNEY GENERAL OF THE STATE OF ARKANSAS, *Petitioner*,

v.

BOBBIE E. HILL, *et al.*, *Respondents*.

On Writ Of Certiorari
To The Supreme Court Of Arkansas

BRIEF OF CITIZENS UNITED FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform and educate the public on a variety of issues of national importance, including congressional reform and questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, Citizens United Foundation has conducted research and published findings on other issues involving Constitutional interpretation, and its work includes having

filed *amicus curiae* briefs in federal district and appellate court litigation related to the constitutionality of the congressional ballot access law in the state of Washington.[1]

The present consolidated action also concerns an effort by the people — in this case, the people of Arkansas — to regulate state and federal elections by restricting certain incumbents' access to the ballot. It can be viewed correctly as litigation by professional politicians against the people, exposing the adversarial relationship between entrenched incumbent legislators and American citizens.[2] The philosophical foundation for the people's attempt to rein in such politicians derives from the United States' divergence from a system of governance by citizen-legislators, as our Framers had intended, to rule by a professional class of politicians who are out of touch with the citizenry and often elected in politically-drawn districts so that they are able to obtain re-election, often for decades, and sometimes for life.

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[1] Citizens United Foundation requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

[2] Far from the example of citizen-legislators who serve their country out of a sense of duty and at considerable sacrifice, current congressional politicians often spend decades "on the Hill," with no visible means of support beyond the public till, losing contact with the problems and concerns of the citizens they rule over (rather than represent), while voting themselves a wide variety of benefits out of the public purse. The Congress, for example, has voted itself — and thereby endowed its members with — a host of perquisites of office, ranging from generous salaries and benefits to exemption from many laws. *See Spotlight on Congress*, "Congressional Perks and Privileges" (Free Congress Foundation, 1994) (reprinted as Appendix A hereto).

The legal question is whether the Constitution permits such action by U.S. citizens (in this case acting through referenda) in the several states, or whether the Constitution was drawn in such a way that it completely usurped from the people, in the several states, their power to determine the qualifications of those who will represent them and their states in Congress.

This brief of Citizens United Foundation examines in depth the historical/legal background of one of the critical issues presented in this case, underlying whether states have the power to add to the qualifications for congressional office enumerated in the Qualifications Clauses of the Constitution. This brief surveys and analyzes historical practices, laws, precedents and commentaries relating to the power of the states to impose eligibility requirements on congressional candidates. As a result, the underpinning for the petitioners' arguments that the people, and the several states, have such right and power is further strengthened. With respect, Citizens United Foundation believes that consideration of the information and analysis in its brief will be helpful for an informed adjudication of the constitutionality of the Arkansas congressional ballot access amendment in question.

SUMMARY OF ARGUMENT

The people of Arkansas have the power, pursuant to the Tenth Amendment, to enact a congressional ballot access law even if such a law is determined to add to the Constitution's enumerated qualifications for congressional office.

In analyzing the constitutionality of state efforts, such as the Arkansas ballot access amendment here in question, Citizens United Foundation has utilized the analysis in *Powell* v. *McCormack*, 395 U.S. 486 (1969), to identify the intent of

the Framers of the Constitution where, as here, the language of the Constitution does not explicitly resolve the question.

In *Powell*, this Court determined the Framers' intent by analyzing: (1) the practices and precedents prior to the federal convention of 1787; (2) the debates and commentaries of the federal convention and state ratification process; and (3) practices during the years following ratification of the Constitution. Utilization of the *Powell* methodology in this case reveals that the "Qualifications Clauses" (art. I, § 2, cl. 2 and art. I, § 3, cl. 3) of the U.S. Constitution prescribe minimal, rather than exclusive, qualifications for office. Since the Constitution does not divest the states of their historical power to require certain qualifications for congressional office, the states have the power under the Tenth Amendment to enact congressional ballot access laws.

The Supreme Court of Arkansas misapplied the *Powell* factors and misread the Framers' intent, applying an incorrect test of constitutionality. Proper construction of the Framers' intent confirms that the Constitution did not deprive the states of their historical power to supplement the requisites for congressional office explicitly enumerated in the Constitution. The Arkansas ballot access amendment at issue in this case, therefore, is a valid exercise of power retained by the citizens of Arkansas.

ARGUMENT

The majority opinion of the Supreme Court of Arkansas in *U.S. Term Limits, Inc.* v. *Hill*, 316 Ark. 251, 872 S.W. 2d 349 (1994), struck down the right of Americans to prescribe in their states reasonable conditions governing the election of their own congressional Representatives and Senators. In holding the Arkansas ballot access amendment

(which it determined would add requirements for Congressional office beyond those enumerated in the Constitution) unconstitutional, the Arkansas court misinterpreted the purport of the so-called Qualifications Clauses (art. I, § 2, cl. 2 and art. I, § 3, cl. 3),[3] which set forth the minimum qualifications for congressional office, but do not limit states' power to add to those qualifications.

The citizens of Arkansas did not enact a law adding new required qualifications for those seeking congressional office. No one was disqualified from service in Congress under this enactment. The measure that was passed as a state constitutional amendment — and struck down by the Supreme Court of Arkansas as contrary to the U.S. Constitution — merely limited ballot access to certain Arkansas residents seeking election to the U.S. House of Representatives or the U.S. Senate who had previously served a specified number of terms in those offices. Such persons were not prevented either from running for re-election or from serving additional terms in office. Thus, whether such a limitation should even be considered a qualification for office, so as to supplement the requirements in the Qualifications Clauses of the U.S. Constitution, is doubtful. *See Storer* v. *Brown*, 415 U.S. 724 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *see also Clements* v. *Fashing* 457 U.S. 957 (1982).

Nevertheless, that threshold issue will undoubtedly be briefed in full by the petitioners, and is not analyzed here. Citizens United Foundation, as *amicus curiae*, has primarily

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[3] The cited clauses are commonly, albeit not officially, referred to as the Qualifications Clauses because they set forth certain prerequisites for holding congressional office. There are, of course, other "qualification" clauses in the Constitution. *See* U.S. Const., art. I, § 3, cl. 7; art. I, § 6, cl. 2; art. VI, cl. 3.

focused on the historical underpinning for the legal determination that Article I of the Constitution does not prohibit the states from adding qualifications for congressional office.

The framework for that analysis was furnished by this Court in *Powell* v. *McCormack*, 395 U.S. 486 (1969). In *Powell*, this Court, considering whether the Constitution limited Congress's ability to judge any qualifications of its members beyond those expressly prescribed by the Constitution, fashioned a three-factor review for determining the Framers' intent, where there was no conclusive answer in the text of the Constitution itself. While that analysis led the Court to rule in *Powell* that the Constitution limits congressional power to judge members' qualifications under Article I, § 5, the proper historical analysis in this case results in a very different finding. When the *Powell* analysis is properly applied to the Qualifications Clauses, it shows that the Constitution did not change the states' ability to supplement the minimum national qualifications for congressional office set forth expressly in the Constitution. The Constitution lists only minimum, not exclusive, qualifications for congressional office, reserving to the states the authority to prescribe additional qualifications for their respective congressional representatives.

I. UNDER *POWELL*'S THREE-FACTOR HISTORICAL ANALYSIS, THE STATES CLEARLY RETAINED THE AUTHORITY TO ADD TO THE CONGRESSIONAL QUALIFICATIONS SET FORTH IN THE CONSTITUTION

In *Powell* v. *McCormack*, *supra*, this Court overruled the House of Representatives's refusal to seat duly-elected Representative Adam Clayton Powell, Jr. (D.-N.Y.) in the 90th Congress. Relying on an in-depth analysis to identify the Framers' original intent, the Court concluded that

Congress lacks "authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *Id.* at 522. The question of Congress's authority in *Powell*, however, involved an interpretation of Article I, § 5, cl. 1 of the Constitution. The relevant question in this case involves the scope of the two Qualifications Clauses (art. I, § 2, cl. 2 and art. I, § 3, cl. 3) of the Constitution.

In the case now before this Court, the Supreme Court of Arkansas purported to look to *Powell* for guidance, but failed to conduct properly the *Powell* analysis. The resulting flawed analysis led that court to conclude that states are prohibited from adding to the constitutionally-enumerated requisites for congressional office. *Hill*, *supra*, 872 S.W.2d at 355-57. By contrast, proper application of *Powell*'s three-factor analysis demonstrates that the Framers intended no such restriction on the powers of the states and the people.

In *Powell*, this Court determined the Framers' intent by looking to the following three factors: (1) the practices and precedents predating the federal convention of 1787, 395 U.S. at 522-532; (2) the debates and commentaries of the federal convention and state ratification process, 395 U.S. at 533-541; and (3) the legislature's own understanding, as manifested by its practices in the years following ratification of the Constitution, 395 U.S. at 541-47. Consideration of those same three guideposts in this case provides the proper historical perspective for discerning the Framers' intent and demonstrates that the Constitution was drafted so as to leave to the states their pre-existing power to add to the enumerated qualifications for congressional office.

A. Colonial and Pre-Federal Convention Precedents Establish That The Authority To Prescribe Qualifications For Congressional Office Was Among The Sovereign Powers Historically Vested In The States

To determine the "historical context" in which the Convention debates concerning expulsion of legislators took place, the *Powell* Court looked to the 16th, 17th, and 18th century practices of the English Parliament, and dealt at length with the case of the expulsion of John Wilkes from the House of Commons, as well as Wilkes' reinstatement in 1782. 395 U.S. at 522-531. Concluding that the precedents regarding expulsion were inconclusive, this Court noted that Wilkes' struggle and ultimate victory nevertheless "had a significant impact on the American colonies" (395 U.S. at 530) just prior to the Constitutional Convention in 1787.

In the case now before this Court, while no Wilkes-like English precedent appears to exist, the colonial and pre-convention practices of the original 13 states provide significant insight into the "historical context" in which the debates over the Qualifications Clauses took place. These practices confirm that the authority to establish qualifications for representatives to the national legislature was within the sovereign powers historically exercised by the several states.

1. Colonial America

In colonial America, there was no uniformity in the method used to appoint delegates to the First Continental Congress. The qualifications and procedure for the selection were left to the individual states. In Connecticut, Massachusetts, Pennsylvania and Rhode Island, for example, delegates were selected by the state legislature. *See* W.P. Adams,

THE FIRST AMERICAN CONSTITUTIONS 39 (1980). South Carolina's five delegates were chosen by a general meeting of 104 "free white men" from throughout the state. *Id.* New York selected its representatives by a combination of direct voting and county committees. *Id.* In the other eight states, delegates were appointed by citizen conventions. *Id.*

During the period between the formal break with the British Crown and adoption of the Articles of Confederation, the states continued to establish their own qualifications and procedures for selecting delegates to the Continental Congress. In Virginia, the General Assembly passed one of the new nation's first term limits statutes, restricting its delegates to serving three successive years. 9 STATUTES AT LARGE (Va.) at 299 (W. Hening, ed.). Shortly thereafter, the limitation was amended to read "three years, in any term of six years." *Id.* at 888. Maryland and Pennsylvania adopted constitutional provisions regulating the qualifications of their respective congressional delegates. In Maryland, delegates were required to be over the age of 21, a resident of the state for five years and the owner of real and personal property with a value of at least "one thousand pounds current money." Md. Const. of 1776, art. XXVII, *reprinted* in 3 FEDERAL AND STATE CONSTITUTIONS (F. Thorpe, ed.) 1695-96. Pennsylvania's constitution imposed term limits and barred persons holding "any office in the gift of the congress" from representing the state in Congress. Pa. Const. of 1776, § 11, *reprinted* in 5 FEDERAL AND STATE CONSTITUTIONS 3085.

As the charters and laws of the original colonies illustrate, the states initially held and exercised the prerogative to establish qualifications and procedures for electing representatives to the First and Second Continental Congresses.

2. The Articles of Confederation

Neither the Constitution nor the Articles of Confederation explicitly address whether the states retained their original authority to determine the qualifications for their congressional representatives. Moreover, the Articles of Confederation contained provisions comparable to the Constitution's "times, places and manner" clause (art. I, § 4, cl. 1) and Qualifications Clauses (art. I, § 2, cl. 2, and art. I, § 3, cl. 3). Since, under the Articles of Confederation, the states clearly exercised the authority to prescribe the qualifications of their own congressional delegates, the similarities between the language of the Articles of Confederation and that of the Constitution are significant.

The Articles provided that congressional delegates "shall be annually appointed in such manner as the legislature of each state shall direct." Art. of Conf., art. V, cl. 1. This clause is similar to the Constitution's "times, places and manner" clause, and confirmed the states' power to set forth the "manner" in which congressional delegates were to be chosen. The Articles further provided that "no person shall be capable of being a delegate for more than three years in any term of six years." *Id.*, art. V, cl. 2. By restricting the time that an individual delegate could serve in Congress within a particular period, the clause set forth a uniform, national qualification for that office. Thus, the clause was a precursor of the Constitution's Qualifications Clauses.[4]

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[4] The absence of a national term limit in the Constitution, in contrast to the Articles of Confederation, is neither evidence of a proscription against limitations on terms in office nor on ballot access. It is rather evidence that the right to impose such limitations was left to the states.

Such provisions in the Articles of Confederation clearly did not deprive the states of their authority to set forth additional qualifications for congressional office. In practice, New Hampshire's constitution required congressional delegates to meet the requirements set forth for the state's chief executive. N.H. Const. of 1784, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS 2467. These requisites included: seven years inhabitancy in the state; being at least thirty years of age; having an estate worth at least "five hundred pounds," at least one-half of which consisted of a freehold in land; and being of the Protestant religion. *Id.* at 2462-63. Other state laws also imposed requirements for congressional office beyond those set forth in the Articles of Confederation. The Virginia legislature restricted the eligibility of its congressional delegates by requiring them to take the following oath:

> I am not directly or indirectly engaged in any merchandize, either foreign or domestic, except for commodities of my own growth or manufacture; and that I will not engage in any such merchandize so long as I continue a delegate in congress. [10 STATUTES AT LARGE (Va.) at 113.]

Reportedly, the first recorded act of the Connecticut legislature during its spring 1784 session was passage of a law prohibiting superior court judges from serving in either the legislature or Congress. See 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 321 (1978).

3. Appointment to the Federal Convention

The states also regulated the appointment of delegates to the Federal Convention of 1787. Virginia was typical. On

October 16, 1786, the General Assembly passed "An Act for Appointing Deputies from this Commonwealth to a Convention Proposed to be held in the City of Philadelphia in May next, for the Purpose of Revising the Federal Constitution." The statute provided for the appointment of seven "commissioners" by a joint ballot of both houses of the legislature. These commissioners were "authorized as deputies from this commonwealth" to meet with the delegates of the other states at the Philadelphia convention where the Constitution was drafted. 12 STATUTES AT LARGE (Va.) at 256.

B. THE DEBATES OF THE FEDERAL CONSTITUTIONAL CONVENTION, AS WELL AS THE DEBATES AND COMMENTARIES DURING THE STATE RATIFICATION PROCESS, DOCUMENT THAT THE FRAMERS DID NOT INTEND FOR THE QUALIFICATIONS CLAUSES TO BE ABSOLUTE

1. Debates of the Federal Convention

There is no record that the question whether to impose exclusive national qualifications for congressional office was discussed at the Constitutional Convention. Indeed, there seems to have been an understanding, consistent with the historical practices referenced above, that the states would be free to establish supplemental requirements for their own congressional delegates.[5]

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[5] There is evidence, by comparing earlier drafts of the Qualifications Clauses with those that were actually adopted, that the notion of an exclusive set of national qualifications for congressional office was rejected early by the Committee of Detail. *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 137 n.6, 139, 178 (M. Farrand, ed.).

On the other hand, there was heated debate over minimum national qualifications for congressional office. When George Mason of Virginia moved to require a minimum age of 25 years for election to the House of Representatives, the debate focused on whether there should be any nationwide minimum age at all. Mason characterized it as "absurd" to allow someone who was not yet old enough to enter into a binding contract to "manage the affairs of a great nation." 5 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 228 (1987). James Wilson of Pennsylvania, however, spoke against any age restriction, saying, "The motion tended to damp the efforts of genius, and of laudable ambition. There was no more reason for incapacitating youth than age, when the requisite qualifications were found." *Id.* at 228-29.

There was also intense debate over whether or not aliens and naturalized citizens would be eligible for election to either house of Congress, and if so, under what conditions. Mason favored allowing immigrants to serve in the House, but was against allowing "foreigners and adventurers" to make laws governing the nation. Fearing that a foreign power such as Britain "might send over her tools who might bribe their way into the Legislature for insidious purposes," Mason suggested a minimum of seven years of U.S. citizenship as a qualification for the House. *Id.* at 389. Gouverneur Morris of Pennsylvania opposed any citizenship or residency requirements, arguing that nothing more than a freehold should be required for election to the House. *Id.* John Rutledge of South Carolina sought a requirement of seven years' residency in the state. *Id.* Alexander Hamilton of New York and James Madison of Virginia believed that the Constitution should "require merely Citizenship & inhabitancy." *Id.* at 411.

Debate over the citizenship and residency requirements for the Senate followed a similar path. Gouverneur Morris moved to substitute a 14-year U.S. citizenship requirement for the four-year requirement in the original draft. He argued that it would be too dangerous to admit strangers into the Senate. *Id.* at 398. James Madison spoke against the amendment, calling it "unnecessary and improper." He said Congress was authorized to regulate naturalization and thus the issue could be resolved short of a constitutional provision. *Id.* Benjamin Franklin of Pennsylvania favored a "reasonable time," while Edmund Randolph of Virginia felt that a fourteen-year disqualification of naturalized citizens was too long. *Id.* at 399. The delegates settled on a nationwide nine-year citizenship requirement for election to the Senate. U.S. Const., art. I, § 3, cl. 3.

While the above contributions to the debate at the Constitutional Convention reflect the view that there should be some national set of minimum qualifications for congressional office, nothing therein suggests that the states would be divested of their historical authority to supplement such qualifications with additional requirements.[6] While the

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[6] Despite extensive debate over the Qualifications Clauses, Madison's notes reveal only two references to delegates expressing the view that the enumerated qualifications would be in any way exclusive. As this Court acknowledged in *Powell*, in each instance, the remarks focused on the ability of Congress, not the states, to enact further qualifications. 395 U.S. at 534.

The first remarks occurred when John Dickinson of Delaware opined that "any recital of qualifications in the Constitution...would by implication tie up the hand of the Legislature from supplying the omissions." 5 DEBATES at 371. As this Court recognized in *Powell*, Dickinson's reference to "the Legislature" referred to Congress, not the state legislatures. 395 U.S. at 532-33. Thus, his comment cannot be

(continued...)

Framers rejected a proposal to vest Congress with authority to enact further restrictions, the evidence suggests that the Framers never intended to restrict the states in this area.

2. The State Ratification Debates and Commentaries

The dominant concern of the ratification debates centered on anti-Federalist accusations that the new Constitution would result in a federal power-grab. Federalists answered those accusations by assuring wary citizens that no such result would occur. Debate over the Qualifications Clauses had a similar tenor. When examined in the context of the overall ratification debates, the debate on the Qualifications Clauses reinforces the view that states retain the power to add to the federally-mandated minimum qualifications for election to Congress.

On October 18, 1787, the New York Journal published the first of sixteen anti-federalist essays by "Brutus." The essay predicted that the new government would "possess absolute and uncontrollable power." 1 J.P. KAMINSKI and R. LEFFLER, FEDERALISTS AND ANTIFEDERALISTS 6 (1989).

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[6](...continued)
construed as a suggestion to limit the power of states. The second instance occurred during consideration of a proposal by the Committee of Detail to grant Congress the authority to enact land ownership qualifications for its members. James Madison spoke against this proposal, saying it vested "an improper & dangerous power in the Legislature." 5 DEBATES at 404. Like Dickinson's earlier comments, Madison was addressing "the delegation to the Congress of the discretionary power to establish any qualifications." *Powell*, 395 U.S. at 534 (emphasis added). His remarks did not address the authority of the states to enact additional qualifications for office.

Nine days later, an essay by "An Old Whig" printed in the Philadelphia Independent Gazetteer, argued that the new federal constitution would largely destroy the separate governments of the several states. *Id.* at 18. Federalists rebutted these charges by assuring that the new government would have limited powers. They promised that authority traditionally exercised by the states, and not delegated to the federal government, would remain vested in the states. For example, in THE FEDERALIST No. 39, James Madison wrote that the jurisdiction of the "proposed Government...extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST 238 (H.C. Lodge, ed. 1889).

Historical documents reflect vigorous discussion of the Qualifications Clauses in only a handful of the original 13 states. Like the debates in the Constitutional Convention, these state debates focused on the appropriate level of federal regulation of congressional elections. Supporters of the Constitution emphasized the need for a national standard of minimum qualifications. They opposed nationally-mandated land ownership requirements and age caps. Contrary to the contentions of those who would oppose state limited ballot access measures, the record does not suggest that Federalists believed the Constitution stripped the states of their historical power to enact their own standards for congressional office.

Although certain isolated statements of James Madison and Alexander Hamilton may appear to be contrary, their works do not support the argument that the Constitution divested the states of their historical power to regulate the qualifications of representatives in the House and Senate. When the writings of these two statesmen, as they relate to the Qualifications Clauses, are read in context, it becomes clear that the limitations they address apply exclusively to

the powers of Congress and the federal government, and not the powers of the states. For example, in THE FEDERALIST No. 60, Hamilton wrote: "[t]he qualifications of the persons who may choose or be chosen...are defined and fixed by the Constitution, and are unalterable by the legislature." THE FEDERALIST 379 (H.C. Lodge, ed.). As this Court pointed out in *Powell*, Hamilton's reference to "the legislature" was a comment on the powers of Congress. 395 U.S. at 539-40. At the start of THE FEDERALIST Number 60, Hamilton explained that his purpose was to demonstrate "the danger ...from [allowing Congress] this ultimate right of regulating its own election." THE FEDERALIST 373-74.

Of similar purport is Madison's comment in THE FEDERALIST No. 52, where he says that the qualifications of the elected — being "more susceptible of uniformity" than as defined in state constitutions — "have been very properly considered and regulated by the convention." *Id.* at 328. This Court in *Powell* referred to this comment as indicative of Hamilton's view that Congress was without the power to add to the constitutionally-enumerated congressional qualifications. 395 U.S. at 340. That is in no way inconsistent with the view that the Qualifications Clauses contain only minimum standards for congressional office. Madison's essay acknowledges that several state constitutions had already set forth their own requisites for congressional office; nowhere does he say these state-imposed requisites would be invalidated to the extent that they supplement the Constitution's requirements.

The Constitutional ratification debates in Virginia, Massachusetts, and other states fail to support a claim that the Constitution defined the exclusive qualifications for congressional office. In Virginia, Delegate Wilson Nicholas observed that the proposed constitution wisely "required"

only the qualifications of age and residence, and that land ownership should not be an additional requirement. "Debates of the Virginia Ratifying Convention," reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 918-19 (1990).

At the Massachusetts convention, Rufus King — a delegate to the Constitutional Convention in Philadelphia — responded to proponents of a national age limitation and a federal requirement of land ownership for candidates to the House of Representatives. King pointed out that the Articles of Confederation did not require land ownership for serving in Congress, and suggested that a national age cap would not work, because "[w]hat in the Southern States would be accounted long life, would be but the meridian in the Northern; what here is the time of ripened judgment is old age there. Therefore the want of such a disqualification cannot be made an objection to the Constitution." 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION at 36 (emphasis in original).

Both the Virginia and the Massachusetts debate focused on federal requirements for election to Congress. These debates do not indicate that the Constitution prevents states from supplementing such requirements. Instead, King's discussion of the effect of climate on longevity and his comparison of the Constitution's Qualifications Clauses and the Articles of Confederation suggest that the individual states might consider land ownership and age caps based on regional differences, instead of mandating national qualifications.

On October 24, 1788, the fourth in a series of pro-ratification essays by "An American Citizen" appeared in Philadelphia's Independent Gazetteer. The article described in detail the constitutional provisions for the "safety and

happiness of the people." 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431 (1978). Discussing the qualifications for congressional office, the essay stated that no qualification in monied or landed property "is required by the proposed plan." *Id.* at 432. Like other commentaries on the Qualifications Clauses, "An American Citizen IV" focused on the limits of federally-mandated qualifications for federal office, and recognized that the federal government would not be permitted to impose requirements of property, wealth, and birthright for election to the House, Senate or presidency. But the essay in no way suggested that individual states would be stripped of their historical authority to impose such restrictions on their congressional representatives.

Throughout the ratification process, the focus of the debates and commentaries on the Qualifications Clauses was on how far the federal government should go in setting forth uniform minimum standards for election to the House and Senate. Delegates and commentators were not concerned about additional requirements the states might impose. When viewed in the context of the general tenor of debate over ratification of the Constitution, the discussions surrounding the Qualifications Clauses reinforce the view that the states retained the authority to add to the constitutionally-prescribed requirements for congressional office.

C. THE POST-RATIFICATION PRACTICES OF THE STATES FURTHER REINFORCE THE VIEW THAT THE STATES RETAINED THE AUTHORITY TO ADD TO THE REQUISITES FOR CONGRESSIONAL OFFICE ENUMERATED IN THE CONSTITUTION

In *Powell*, this Court looked to Congress's early interpretation of its powers under art. I, § 5, to help determine the

Framers' intent, and noted that its efforts to exclude members on the basis of qualifications not expressly prescribed in the Constitution were both late and inconsistent. 395 U.S. at 543-46. As a result, the Court concluded that Congress's early understanding of its powers "confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership." *Id.* at 547. In sharp contrast to the history of Congress's early post-ratification practices relating to exclusion of congressional members-elect, the states supplemented the qualifications for congressional office enumerated in the Constitution immediately after the Constitution was ratified.

On November 20, 1788, the Virginia General Assembly passed "An Act for the election of Representatives Pursuant to the Constitution of Government of the United States." The law required representatives to live in their respective congressional districts, and further mandated that they be land owners. 12 STATUTES AT LARGE (Va.) at 653. In 1790, a Maryland statute divided the state into six congressional districts and required candidates for the House to reside in their respective districts for at least twelve months prior to their election. See *Hellmann* v. *Collier*, 217 Md. 93, 141 A.2d 908 (1958) (citing Ch. XVI, Acts of 1790). By the mid-1800s, the legislatures of at least nine states had enacted requisites for congressional office beyond those enumerated in the Qualifications Clauses. Of the original 13 states, Connecticut, Georgia and Massachusetts joined Maryland and Virginia in requiring candidates for the House to live in their respective congressional districts. See "Legal Qualifications of Representatives," 3 American L. Rev. 411 (1869). The 14th state to join the United States (Vermont) enacted a similar restriction. *Id.* New York and Tennessee prohibited members of their legislature from being elected to the U.S. Senate. *Id.* And Illinois barred its Supreme Court

and Circuit Court judges from seeking election to either the House or Senate. *Id.*

Unlike Congress's early post-ratification practices regarding exclusion of its members — which, when analyzed by this Court in *Powell*, led to the conclusion that Congress lacked such authority — the imposition of additional qualifications upon congressional candidates by the states reinforces the view that the states retained the historical power to add to the requirements for congressional office enumerated in the Constitution.[7]

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[7] Several state and lower federal courts have struck down state laws deemed to add to the qualifications for congressional office enumerated in the Constitution, *See, e.g., Dillon* v. *Fiorina*, 340 F.Supp. 729 (D. New Mex. 1972); *Stack* v. *Adams*, 315 F.Supp. 1295 (N.D. Fla. 1970); *Stockton* v. *McFarland*, 56 Ariz. 138, 106 P.2d 328 (Ariz. 1940); *State ex rel. Chandler* v. *Howell*, 104 Wash. 99, 175 P. 569 (1918). Nevertheless, certain of these opinions which invalidated "resign-to-run" state statutes may no longer be good precedent in view of this Court's decision in *Clements* v. *Fashing*, 457 U.S. 957 (1982). Furthermore, most of these holdings antedate the formulation this Court established in *Powell* to scrutinize post-ratification actions as a means to determine original intent. The *Powell* Court looked to Congress's early interpretation of its own powers, not the lower federal courts' interpretation of these powers. The relevant focus here, therefore, would be on the actions by state legislatures reflecting the several states' early interpretation of their reserved powers.

D. Application of Powell's Three-Factor Analysis Convincingly Supports the Power and Right of Residents of the Several States to Prescribe Qualifications for Congressional Office

In *Powell*, each of the Court's three factors for measuring the Framers' intent supported the view that Congress lacked the power under review, *i.e.*, to exclude a duly-elected member. As indicated above, however, examination of each of the Powell factors in this case demonstrates that the states indeed possess the power at issue in this case (*i.e.*, to add to the minimum standards for congressional office set forth in the Constitution). The combined effect of the pre-federal convention practices of the states, the debates over the adoption and ratification of the Constitution, and the post-ratification practices of the states, reveals convincingly that the Framers did not intend to strip the states of their historical power to enact qualifications for congressional office beyond those enumerated in the Constitution. If they had so intended, the Constitution presumably would have said so. Additionally, such a dramatic change from pre-constitutional practice could have been expected to spark enormous debate. But, as indicated above, there appears to have been no such debate. Such silence is deafening in the case of such an important right, and is further confirmation that the states were understood to have retained their rights to prescribe qualifications for their own congressional representatives.

II. The Tenth Amendment Confirms State Power to Enact Congressional Ballot Access Limitation Laws

As mentioned in section I.A.2. of this brief, the Articles of Confederation, like the Constitution, contain no language

specifically bestowing upon the states the authority to enact qualifications for their congressional representatives. Article II of the Articles of Confederation, however, expressly confirmed that the states retained the exercise of their historical powers "not expressly delegated to the United States." The Tenth Amendment also confirms and guarantees to the several states all reserved powers "not delegated to the United States...nor prohibited...to the States."

The word "expressly" was omitted from the Tenth Amendment to ensure that the federal government could exercise implied powers as well as expressly delegated powers. Nevertheless, except where specifically limited by the Constitution, the states retained the same rights and powers pursuant to the Tenth Amendment that they held under the Articles of Confederation. From the perspective of Tenth Amendment analysis, therefore, the debate over the constitutionality of state-imposed ballot access limitations on congressional office-seekers turns on whether the Qualifications Clauses divest the states of their historical power to prescribe requisites for congressional office. On this point, President Thomas Jefferson and Justice Joseph Story sharply disagreed. President Jefferson wrote:

> Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years,

> and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the States. [Letter from Thomas Jefferson To Joseph C. Cabell (Jan. 31, 1814), *reprinted* in 2 P.B. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 81 (1987) (emphasis added).]

In discussing the qualifications of members of the House of Representatives, Justice Story took the position that since the office of Representative was a creature of the Constitution, the states have no authority to add to the enumerated qualifications, because there was no specific grant of the power to do so in the Constitution. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 626. Justice Story also expressed fear that recognizing a state power to enact congressional qualifications would give the states the power to subvert the Constitution. He worried that "[a] state may, with the sole object of dissolving the Union, create qualifications so high, and so singular, that it shall be impracticable to elect any representative." *Id.* at § 623.

There are at least three flaws in Justice Story's argument. First, as the analysis in part I of this brief demonstrates, Justice Story's position is inconsistent with the Framers' original intent. The *Powell* analysis leads to strong evidence

that the states always held the authority to define the qualifications of their representatives to the national legislature, and that the Framers never acted to strip the states of this historical sovereign power. Second, Justice Story's argument is inconsistent with his own theory regarding the powers of the states under the Tenth Amendment. In his Tenth Amendment analysis, he stressed that the Constitution is "an instrument of limited and enumerated powers...what is not conferred, is withheld, and belongs to the state authorities." 3 STORY, COMMENTARIES § 1900. On the question of qualifications for congressional office, however, he ignores the states' historical practices and asserts that the power to define requisites for congressional office should not exist unless the governing compact specifically delegates this power to the states. Presumably, if that view were correct, the states also would have been powerless to enact qualifications for their congressional representatives under the Articles of Confederation. Yet no one disputes that the states had such power under the Articles of Confederation. Third, recognizing a state power to enact additional qualifications for congressional office does not give the states the power to subvert the Constitution.[8] If a state were to pass such a measure, the Supremacy Clause makes it clear that such a law would be unconstitutional. U.S. Const., art. VI, cl. 2. And the power of the federal courts to overturn an unconstitutional law is well established. U.S. Const. art. III,

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[8] It must be pointed out that nothing in the Arkansas ballot access amendment could be construed as subverting the Constitution. That state constitutional law would merely block ballot access to congressional incumbents who had served a specified number of terms. It does not "create qualifications so high, and so singular, that it shall become impracticable to elect any representative." 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 623. The Arkansas ballot access amendment entails none of the mischief cited by Justice Story as endangering the survival of the Union.

§ 2; *see also McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405-409 (1819).

President Jefferson's above-quoted analysis that states had the authority to supplement the qualifications for congressional office is consistent with the original intent of the Framers as determined by the *Powell* analysis. It also offers a logically consistent comparison between the powers of the states under the Constitution and those under the Articles of Confederation. When the relevant factors are considered and properly weighed, it is evident that, under the Constitution, the states retained their historical power to supplement the qualifications for congressional office enumerated in the Constitution. Hence, even if the Arkansas ballot access amendment is found to add to the qualifications for congressional office listed in the Constitution, it is a valid exercise of Arkansas' power under the Tenth Amendment.

III. The Supreme Court of Arkansas Misread the Original Intent of the Framers, Misconstrued *Powell* and Improperly Analyzed the Powers of the States Under the Tenth Amendment

While the majority opinion of the Supreme Court of Arkansas below paid lip service to the *Powell* analysis, the decision misconstrues or ignores the relevant authorities, and appears to totally misread the Framers' original intent.[9]

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[9] A federal district court that recently struck down Washington State's congressional ballot access statute made similar errors. For example, that court, in reaching its conclusions, misread Hamilton's statement in The Federalist No. 60 and mistakenly looked to Congress's early actions or opinions as evidence on the question rather than to the states' own early interpretation of their individual powers. See *Thorsted* v. *Gregoire*, 841 F.Supp. 1068, 1076 (W.D. Wash. 1994). As of the

(continued...)

A. THE ARKANSAS COURT MISCONSTRUED SEVERAL IMPORTANT AUTHORITIES

In its analysis of the Qualifications Clauses, the Supreme Court of Arkansas, in *U.S. Term Limits, Inc.* v. *Hill*, *supra*, acknowledged that the states had the authority under the Articles of Confederation to establish qualifications for their congressional representatives. 872 S.W.2d at 356. That acknowledgment, however, is followed by the following statement, indicating a narrow view of the powers of the states and the people: "[t]he framers of the U.S. Constitution did not expressly endow the states with this same authority." *Id.* But the states may properly continue to exercise such authority without an express grant by the Constitution. The states retain this power pursuant to the Tenth Amendment. As Justice Hays succinctly explained in his dissent in *U.S. Term Limits, Inc.* v. *Hill*, *supra*:

> The people of each state possess all powers which are not expressly or impliedly delegated to the federal government or which they are not prohibited from exercising by the United States Constitution. [*Id.* at 46 (Hays, J., dissenting).]

The majority of the Arkansas Court also cited Charles Warren's THE MAKING OF THE CONSTITUTION for the proposition that the federal convention of 1787 "defeated a proposal for the states to set property qualifications for service in Congress." 872 S.W.2d at 356. This assertion is in error. The authorities, including Warren's book, clearly

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[9](...continued)
writing of this brief, a review of the District Court's opinion was pending, *sub nom. Thorsted* v. *Munro*, before the U.S. Court of Appeals for the Ninth Circuit (Nos. 94-35222 and 94-35223).

state that the federal convention of 1787 considered and defeated a proposal authorizing Congress to legislate a uniform property ownership requirement for election to the House and Senate. THE MAKING OF THE CONSTITUTION 416-419 (1993). See also 5 DEBATES 402-04. This *amicus* is unaware of anything in the records of the federal convention suggesting that the Framers considered, much less defeated, a proposal of the nature claimed by the majority opinion in *U.S. Term Limits, Inc.* v. *Hill.*[10]

The imprecise nature of the Arkansas Court's analysis is further demonstrated by its mischaracterization of Alexander Hamilton's statement that the "legislature" has no authority to alter the qualifications set forth in the Constitution. While the Supreme Court of Arkansas properly concedes that this comment was directed at the powers of Congress and not the states, it nonetheless asserts that Hamilton's "allusion to the fixed and immutable character of the enumerated qualifications" evidences an unstated desire on the part of the Framers to strip the states of this power too. 872 S.W.2d at 356. But that statement ignores historical fact. Hamilton's introductory comments state outright that he is discussing the danger of giving Congress unfettered power to regulate its own membership. *See supra*, pp. 16-17. There is nothing in the context of Hamilton's statement to support the Arkansas Court's inference of a secret agenda designed to strip the

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[10] Since the states at the time of the convention already exercised, as part of their historical sovereign powers, the authority to set forth their own requisites for their congressional representatives, a proposal of the nature suggested by the Arkansas court would have been unnecessary. On the other hand, if the Framers desired to divest the states of this historical authority, one would have expected a proposal, debate and an affirmative vote accomplishing that end. Of course, there is nothing in the record that would suggest that this latter series of events occurred.

states of their historical power to prescribe qualifications for congressional office.

B. Important Authorities Were Ignored by the Supreme Court of Arkansas

The Supreme Court of Arkansas made no mention of the early post-ratification practices of the states. Instead, the court focused only on Congress's view of the powers of the states in the early post-ratification years. Congress's view of the states' powers is not the critical factor under the *Powell* analysis; it is the states' view of their own powers that is important. As detailed above, the states have long perceived their powers as including the power to add to the enumerated qualifications for congressional office. *See supra*, pp. 19-21. The Arkansas decision also fails to analyze the overall tenor of the ratification debates. Throughout the process, Federalists repeatedly assured the citizenry that the federal government was one of limited powers. The states were to retain the powers that they traditionally held, except where specifically divested of a particular power by the Constitution. *See supra*, pp. 22-26. There is nothing in the Constitution specifically divesting the states of their historical authority to add to the requirements for congressional office enumerated in the Qualifications Clauses of the Constitution, but the majority below nevertheless determined that such authority no longer exists.

C. The Supreme Court of Arkansas Misjudged the Framers' Intent

The majority opinion of the Supreme Court of Arkansas claims to give effect to the Framers' original intent, but as explained above and in the dissent of Justice Hays, 872 S.W.2d at 367-68, the majority's analysis is seriously

flawed. *Powell*'s three-factor analysis demonstrates that the Framers did not intend to divest the states of their historical sovereign power to add to the requisites for congressional office enumerated in the Constitution. To give effect to the Framers' intent, the holding of the Supreme Court of Arkansas should be reversed.

CONCLUSION

For the reasons set forth above, Citizens United Foundation respectfully requests this Court to reverse the decision of the Supreme Court of Arkansas as to the constitutionality of Arkansas' congressional ballot access amendment, and to uphold the constitutionality of that amendment.

Respectfully Submitted,

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APPENDIX

APPENDIX A

CONGRESSIONAL PERKS AND PRIVILEGES

[© 1994 Free Congress Foundation, 717 Second Street, N.E., Washington, D.C. 20002, "Spotlight on Congress." (Reprinted with permission.)]

The following is a list of what taxpayers give congressmen for serving in office:

1. Salary — $133,600

2. Lucrative health benefits, with approximately two-thirds paid by taxpayers.

3. Life insurance worth $136,000. Fifty percent of premiums paid by taxpayers.

4. Very generous retirement plan — Congressmen pay 7.5 percent of salary. May receive benefits at age 50 with 20 years of service, or at age 60 with 10 years of service. Average benefits collected are $730,635, about three times average private benefits. A congressman leaving office in 1992 after 12 years of service receives almost $50,000 per year. This is in addition to Social Security, military pensions, or any other private pension program. Even congressmen who are convicted felons may still receive their retirement.

5. Eligible for workman's compensation, unemployment, and survivor benefits.

6. Taxpayer-subsidized day care facility.

7. Health services, including 24-hour medical staff on call in Capitol, ambulance restricted to

congressmen, annual physical exam, complete laboratory, x-ray, pharmacy and physiotherapy services, electro-cardiographic services, immunization and allergy injections for congressmen and staff, consultations and hospitalization at subsidized rates. (Annual fee charged for non-emergency services.)

8. Health facilities, including gymnasium, swimming pool, paddleball, steamroom, etc. Available for cheap annual fee.

9. Congressional license tags, which then assure freedom to violate most Washington parking laws with impunity.

10. Allowed to receive gifts up to $200 value from foreign governments.

11. Travel mileage to and from sessions of Congress reimbursed by taxpayers at 27 cents per mile.

12. Twenty-two paid staff members.

13. Barber and beauty shops.

14. Check-cashing privileges at House bank.

15. Free picture framing for office displays (which they later take home).

16. Free plants for office decoration. (Many of these also find their way home). Potted palms can be borrowed and floral centerpieces obtained free for "official functions."

17. Free maps of all kinds (nautical, aeronautical, geological, relief, etc.) are available from government sources.

18. Two framed reproductions of paintings and prints are available on loan for office display.

19. Meeting rooms of all sizes can be reserved for private use.

20. Free photographic services, including portraits, candids, news, and slides for television use. Developing and printing services are heavily subsidized.

21. Heavily subsidized printing services, mostly paid from official expense account.

22. Free collating, stapling, inserting, and other bindery services.

23 Free package wrapping.

24. Free pickup and delivery service for bindery projects.

25. Fifty free file boxes per session. Many of these are taken by the staff to facilitate moving day at home.

26. Free publications, including 2500 official House Calendars, hardcover agricultural yearbooks, 20,000 consumer information pamphlets, and a book containing the public speeches of all the presidents.

27. State of the art recording facilities available at very nominal cost, to be paid from congressman's official expense account. Services include production of radio and television programs; same day duplicates; extensive editing.

28. Free mail. Known as the frank, these privileges include:

    — A postage expense account equal to three mailings per year to EVERY household in the district at First Class rate. In addition, congressman is allowed to transfer up to $25,000 from other accounts into the franking account. Charges against franking account include all general correspondence and special mailings, such as newsletters.

    — Newsletters may:
        — contain two sheets of 11.5" x 17".
        — include two pictures of congressman per page, up to 20 percent of page.
        — display congressman's name an average of eight times per page (in addition to several "exceptions").
        — display congressman's voting record (using congressman's description of vote).
        — include "issue surveys," which are then valuable for targeted courting of individuals and groups through careful list development.

29. Free surplus books are available from the Library of Congress for congressmen to donate to local

libraries and others. (It makes for good local press!)

30. Free seeds and agricultural reports through franked mail, EVEN DURING THE 90 DAY PERIOD FOLLOWING THE EXPIRATION OF THEIR TERMS IN OFFICE.

31. Annual "official expense account" of $225,389, which covers travel expenses, office supplies, office equipment, and even furniture FOR THE DISTRICT OFFICES. Annual "clerk-hire account" of $557,400 to pay for twenty-two staff members.

32. Congressmen elected before 1980 and retired in 1992 were allowed to keep leftover campaign funds for themselves. Up to $40 million could have been pocketed in this deal.

33. Long-distance telephone privileges, paid for from clerk-hire account.

34. Heavily-subsidized dining facilities. Until recently, congressmen were also given very loosely watched "charging" privileges.

35. Congressmen and staff can charge training programs, study courses, and information courses to the congressman's expense account.

36. Congressmen and their families may borrow materials from the Library of Congress. The public may not do so.

37. Congressmen are exempt from jury duty.

38. During "official trips," congressmen, staff and spouses often get abnormal amounts of "free" time, along with taxpayer-subsidized ground transportation, alcohol, entertainment, and even "per diem" cash for personal expenses.

39. Congress has exempted itself from:

- The Social Security Act of 1933
- The National Labor Relations Act of 1935
- The Minimum Wage Act of 1935
- The Equal Pay Act of 1963
- The Civil Rights Act of 1964
- The Freedom of Information Act of 1966
- The Age Discrimination Act of 1967
- The Occupational Safety and Health Act of 1970
- The Equal Employment Opportunity Act of 1972
- Title IX, Higher Education Act Amendments of 1972
- The Rehabilitation Act of 1973
- The Privacy Act of 1974
- The Age Discrimination Act Amendments of 1975
- The Ethics in Government Act of 1978
- The Civil Rights Restoration Act of 1988

40. Congressmen get a $3,000 tax deduction for added living expenses.